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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES P. LEHNERT, *et alia*,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et alia*,

Respondents.

On A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE PUBLIC SERVICE RESEARCH COUNCIL, INC., IN SUPPORT OF PETITIONERS, URGING REVERSAL

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BRIEF *AMICUS CURIAE* OF THE PUBLIC SERVICE RESEARCH COUNCIL, INC., IN SUPPORT OF PETITIONERS, URGING REVERSAL

INTRODUCTION

Pursuant to Rule 37.3 of the Rules of this Court, the Public Service Research Council, Inc., submits this brief *amicus curiae* in support of petitioners, urging reversal of the decision of the Court of Appeals. Petitioners and respondents have consented to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The Public Service Research Council, Inc., is this nation's largest independent, nonprofit citizens' organization concerned with public-sector unionism and the influence of public-sector unions on governmental institutions, policies, and operations. With its sister organization, the Public Service Research Foundation, Inc., the Council widely distributes research and studies on public-sector unionism to the general public, the print and electronic media, the Congress, various governmental units throughout the United States, and other interested persons. The Council also engages in wide-ranging public education, legislative action, assistance to local citizens' groups, and legal challenges to the abuses of public-sector unionism.

More specifically, the Council has participated as *amicus curiae* in numerous cases before this Court, including *City of Madison, Joint School District No. 8* v. *WERC*, No. 79-946 (October Term, 1975); *Perry Education Association* v. *Perry Local Educators' Association*, No. 81-896 (October Term, 1981); and *Bu-*

reau of Alcohol, Tobacco, and Firearms v. *Federal Labor Relations Authority*, No. 82-799 (October Term, 1982); and earlier filed a brief *amicus curiae* in support of the petition for a writ of certiorari in this case.

The Council is concerned with the instant case because the Court of Appeals has ruled that:

- public-sector unions may impose themselves as the unwanted *political* "representatives" of dissenting non-union public employees in legislative, electoral, and other political arenas not an integral part of the collective-bargaining process; and
- those unions may demand that non-union employees in one local bargaining-unit pay "agency fees" for alleged "services" the unions supply to *other* employees in *other* local bargaining-units throughout the State and the United States.

These rulings expand public-sector collective bargaining far beyond constitutional boundaries.

The Council anticipates that petitioners' briefs will focus on the numerous and particular *details* of this case. In this brief *amicus curiae*, the Council hopes to provide this Court with an *overview* of the two fundamental issues the Court of Appeals' decision presents.

SUMMARY OF THE ARGUMENT

The Court of Appeals' decision is doubly defective: *First*, it licenses the Ferris Faculty Association (FFA) and its affiliates, the Michigan Education Association (MEA) and the National Education Association (NEA), to extract "agency fees" from non-union teachers for

"legislative lobbying and other political activities"[1] outside the definition of "collective bargaining" in the Michigan law *sub judice*[2] and in contradiction of *Abood* v. *Detroit Board of Education*[3] and *Ellis* v. *Railway Clerks*[4]. *Second*, the court's judicial *fiat* authorizes *statewide* and *nationwide* "exclusive representatives", far exceeding what Michigan has done, or has constitutional authority to do, in empowering FFA as petitioners' local "representative" for collective bargaining with Ferris State College.

ARGUMENT

I. The Court of Appeals' decision eviscerates *Abood* and *Ellis*, by licensing the Ferris Faculty Association to charge non-union teachers an "agency fee" for "legislative lobbying and other political activities" that are *not* "an integral part of the bargaining process" established by the Michigan legislature.

A. The Court of Appeals agreed with the District Court that "the legislative lobbying and other political activities engaged in by [FFA] and its affiliated unions were sufficiently related to the unions' duties as the collective bargaining representative of [petitioners] to be chargeable to them", "[b]ecause the terms and conditions of employment for the public sector employees * * * are obviously closely connected to the

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[1] Appendix to Petition for a Writ of Certiorari herein (Pet. App.) at 8a, 881 F.2d at 1392.

[2] *See* Mich. Comp. Laws § 423.215, sec. 15, *in* Pet. App. at 93a.

[3] 431 U.S. 209 (1977).

[4] 466 U.S. 435 (1984).

funding provided to public education".[5] For this reason, the court licensed FFA, MEA, and NEA to extract "agency fees" for "not only lobbying but also millage and ballot campaigns *necessary to fund public education*".[6] The Court of Appeals did *not* suggest—and the District Court did *not* find—that such "lobbying . . . millage and ballot campaigns" were "necessary to fund" or otherwise implement a specific collective-bargaining agreement between Ferris State College and FFA. Thus, the lower courts have upheld inclusion of the costs of "lobbying . . . millage and ballot campaigns" in the "agency fee", *not because these activities are part of the* ***present process*** *of collective bargaining at Ferris State College, but instead because they* ***may*** *affect the substantive* ***result*** *of* ***future*** *bargaining.*

B. This holding embodies three fundamental errors.

1. Under *Abood* and *Ellis*, the costs of *any* union activity not "an *integral part* of the bargaining *process*"[7], as defined by State law consistent with the Constitution, are not "necessarily or reasonably incurred for the purpose of performing the *duties* of an exclusive representative in dealing *with the employer* on *labor-management* issues"[8]. The analytical criteria applicable in this case are thus straightforward and unequivocal:

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[5] Pet. App. at 8a, 9a, 881 F.2d at 1392. On the confusion in the court's references to "the *unions'* duties as the exclusive representative" and to "employees represented by the *unions*", *see post*, pp. 18-21.

[6] Pet. App. at 9a (emphasis in original).

[7] Abood, 431 U.S. at 236 (emphasis supplied).

[8] Ellis, 466 U.S. at 448 (emphasis supplied).

• Michigan law narrowly defines "bargain[ing] collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party".[9]

• The constitutionality of this definition, which parallels corresponding provisions in the private-sector National Labor Relations Act[10] and Railway Labor Act[11], was sustained in *Abood*[12]. To date, this is the *only* definition of "collective bargaining" this Court has ever sanctioned.[13]

• *Abood* noted that

> [t]he *process of establishing a written collective-bargaining agreement* prescribing the terms and conditions of public employment may require not

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[9] Mich. Comp. Laws § 423.215, sec. 15, *in* Pet. App. at 93a-94a. Thus, the unions' reliance on such lower-court decisions from other States as *Robinson* and *Champion*, which addressed more expansive statutory definitions of "collective bargaining", is bootless. *See* Robinson v. State of New Jersey, 741 F.2d 598, 602 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); Champion v. State of California, 738 F.2d 1082, 1086 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985).

[10] Section 8(d), 29 U.S.C. § 158(d).

[11] Section 2, First, 45 U.S.C. § 2, First.

[12] 431 U.S. at 217-26.

[13] Again, this highlights the fecklessness of the unions' reliance on cases such as *Robinson* and *Champion*. *See* note 9, *ante*.

> merely concord at the bargaining table, but *subsequent approval* by other public authorities; *related* budgetary and appropriations decisions might be seen as *an integral part of the bargaining process*.[14]

Abood thus forbids interpolation into Michigan's statutory definition of "collective bargaining" of "lobbying . . . millage and ballot campaigns" that are not "an *integral* part of the bargaining *process*"—that is, "[t]he *process* of establishing a written collective-bargaining agreement".

Key terms here are "process" and "integral". That some union activity may "relate" to collective bargaining in a substantive sense is not enough to bring the activity arguably within the category of "bargaining", if that activity is not itself operationally part of "the [statutorily defined] *process* of establishing a written collective-bargaining agreement".[15] Moreover, the activity must be "an *integral* part of [that] process", in the sense of "necessary to make a whole" of it.[16] The lexicographical inference that *Abood* used the adjective "integral" to imply *comple-*

[14] 431 U.S. at 236 (emphasis supplied).

[15] *E.g.*, union lobbying for statutory benefits that public employees receive in addition to the terms and conditions of employment that derive from collective bargaining, and which benefits are not the subjects of bargaining, is arguably "related" *substantively* to bargaining because it deals with the same general subject-matter: *viz.*, obtaining benefits for public employees *qua* employees. It is not *operationally* part of collective bargaining, however, because it involves a *different process* altogether.

[16] *Webster's New Twentieth Century Dictionary* (2d ed. unabrgd., 1970), at 953.

tion is strengthened by the Court's reference to "*subsequent* approval" and "*related* budgetary and appropriations decisions"—decisions that *follow* and *implement* the "written collective-bargaining agreement" which they "approv[e]" and to which they "relat[e]".

• Finally, *Ellis* held that "agency fees" may include only those union "expenditures * * * necessarily or reasonably incurred for the purpose of performing the *duties* of an exclusive representative of the employees in dealing with *the employer* on *labor-management issues * * * in the bargaining unit*".[17] This reinforces *Abood* on two counts: *first*, because "the duties of an exclusive representative" derive from, reflect, and find their natural limitations in the statutory definition of "collective bargaining"; and, *second*, because the representative's "duties * * * in dealing with the employer * * * in the bargaining unit" imply a *process-oriented* analysis with a circumscribed target ("the employer"), subject-matter ("labor-management issues"), and locus ("the bargaining unit").

Against this analytical background, the Court of Appeals' inclusion of "lobbying . . . millage and ballot campaigns" within collective bargaining is unsupportable:

First, FFA "bargain[s] collectively" when it "meet[s]" *with the employer* (Ferris State College) to negotiate the employer's *costs* for the services of its employees, which to some degree *the employer itself*

[17] 466 U.S. at 448 (emphasis supplied).

can control through the process of negotiations[18]. "[L]obbying . . . millage and ballot campaigns", distinguishably, involve attempts by FAA, MEA, and NEA to increase the employer's *income* through appeals to *the Michigan legislature* or the *voters*. "[L]obbying . . . millage and ballot campaigns" thus fall outside of collective bargaining at the very threshold, because these techniques deal, *not* with the employer, but instead either with a separate, independent, and superior level of government (the legislature) or with the people as voters, in order to influence how the legislature allocates its income or how the people tax themselves to provide income to the government.

Second, "lobbying . . . millage and ballot campaigns" address no matter the employer can affect through the "meet * * * and confer" process of bargaining. How the employer allocates the resources already available to it to compensate its employees is the subject-matter of collective bargaining, in which both the employer and FFA are required by law to participate "in good faith".[19] How superior levels of government or the public provide those resources in the first instance is the subject-matter of *other, independent* political processes, in which neither the em-

[18] The duty "to bargain collectively" "does not compel either party to agree to a proposal or require the making of a concession". Mich. Comp. Laws § 423.215, sec. 15, *in* Pet. App. at 93a-94a.

[19] Of course, a different situation would be presented were the "lobbying . . . millage and ballot campaigns" directed towards funding of a specific collective-bargaining agreement that depended for its implementation on legislative or popular approval. That is not the case here, however.

ployer nor FFA is required to participate, in which the "good faith" *vel non* of any party is irrelevant, and through which FFA obtains no guarantee and the employer incurs no obligation that any enhanced revenue accruing to the employer will in fact ever be "passed through" to the employees in the form of increased compensation.

Third, unlike collective bargaining, "lobbying . . . millage and ballot campaigns" impact upon far more than simply "wages, hours, and other terms and conditions of employment". Indeed, these activities affect both taxation and governmental budget-allocations—and, through the latter, influence the very prioritization of competing public policies. None of these matters is, by the wildest stretch of the imagination, within the competence of collective bargaining. Neither could any of them be brought within that competence, without the most radical restructuring of the traditional American system of representative government and individual political liberty.[20]

The Court of Appeals rationalized its decision by pontificating that

> [i]t cannot be disputed that governmental budget and appropriations decisions directly affect the terms and conditions of employment for public employees. To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their

[20] *See, e.g.*, E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Public Service Research Foundation, 1980).

members' interests in legislative and other "political" arenas.[21]

But, even were this description arguably factual, the question would nevertheless remain whether Michigan's collective-bargaining law has delegated to unions *acting as the statutory "exclusive representatives" of non-union employees* all the powers the Court of Appeals imagined the unions need "[t]o represent their members effectively"—or whether the law has left the unions to "advanc[e] their members' interests in legislative and other 'political' arenas" *as merely private organizations* with *no* coercive authority over non-union employees. Surely, a statutory grant of only part of the power unions want to "advanc[e] their members' interests" involves no logical or legal inconsistency. Similarly, merely stating the truism that "governmental budget and appropriations decisions directly affect the terms and conditions of employment for public employees" leaves unanswered the question of whether *particular* "decisions" are "an integral part of the bargaining process" under *Abood* and *Ellis*. Surely, *Abood* would not have noted that "related budgetary and appropriations decisions *might* be seen as an integral part of the bargaining process" if, as the Court of Appeals naively argued, *all* such decisions *must* be subsumed within "collective bargaining".

In sum, the Court of Appeals was accidentally insightful when it argued that public-sector "unions must necessarily concern themselves *not only with negotiations at the bargaining table* but also with * * * legislative and other 'political' arenas". For the

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[21] Pet. App. at 7a, 881 F.2d at 1392.

unions' activism in this case is palpably *not* "an integral part of the bargaining process" but instead an adventure in "*other* 'political' arenas".

2. The Court of Appeals' decision is also fatally flawed because its implicit "rule"—that the costs of "legislative lobbying and other political activities" that may implicate "appropriations decisions" are includable in an "agency fee"—is *unlimited* by any intelligible principle. Indeed, this is the inescapable result of the Court of Appeals' shifting its focus from the *process* of collective bargaining (which can be accurately defined in terms of either the *employer's* involvement or the ratification or implementation of a specific *agreement*) to the activities of the union with respect to third parties in "other 'political' arenas" that *may* affect the *results* of that process *in futuro*.

First, the "rule" is overbroad even as to lobbying. The amount A that a governmental employer may be allocated (by the legislature or by popular vote), and part of which amount the employer may use to pay its employees, depends on the amounts B, C, D, . . ., Z the government has available or the people supply to fund all other public programs—which amounts, in turn, depend on the levels of taxation and borrowing the community sustains, the public priorities for allocation of revenue, and numerous other controversial issues of public policy. According to the Court of Appeals, a union's statutory authority to negotiate the *portion* of A that employees will receive also empowers it to compel non-union employees to subsidize its legislative and electoral activism with respect to A itself, with respect to the size and priority of every governmental expenditure that could possibly compete with A, with respect to every means by which the

government could raise revenue that might be allocated to *A*—in short, to lobby on essentially anything and everything!

Second, the Court of Appeals' "rule" is especially ill-advised in the context of the "millage and ballot *campaigns*" involved here. As a practical matter, a political continuum extends from "lobbying", through "millage and ballot campaigns", *to the election of candidates for public office*: For no "lobbying" can succeed if incumbent legislators lack sympathy for the lobbyists' goals; and the difference between "millage and ballot campaigns" and candidates' campaigns asymptotically approaches zero in the real world of politics[22]. Therefore, if the Court of Appeals correctly concluded that "collective bargaining" subsumes union activism in whatever "other 'political' arenas" the unions "must necessarily" enter "'[t]o represent their members effectively", including the *electoral* "arena", then the costs of union participation *in partisan political elections* must also logically be includable in "agency fees". *Abood* held, however, that non-union employees may *not* be required to "associate with a political party" or to subsidize union expenditures "on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union's] duties as collective-bargaining representative".[23] Obviously, a severe tension exists between the

[22] *E.g.*, the difference between two candidates for local or state office often lies in their contrary positions on funding education, on promoting public-sector unionism, or on some other issue "related" to collective bargaining in the loose sense favored by the Court of Appeals.

[23] 431 U.S. at 235 (footnote omitted).The direct linguistic linkage between "political candidates" and "*other* ideological causes

Court of Appeals' theory and the holding of *Abood*—a tension unresolvable, in any *principled* fashion, by pretending that both are correct.

3. Doubly unavailing is the purely result-oriented rationalization for the Court of Appeals' "rule" that, if FFA's "lobbying . . . millage and ballot campaigns" increase the funds available to Ferris State College, at some later date the latter may agree through collective bargaining to augment its employees' compensation.

First, the contention proves too much, as it would license the unlimited inclusion in "agency fees" of the costs of lobbying by "exclusive representatives" in the *private* sector.[24]

not germane to [the union's] duties as collective-bargaining representative" demonstrates that *Abood* considered support of "political candidates" "not germane to [the union's] duties" as a matter of law.

[24] *E.g.*, if lobbying to increase a private employer's income is a part of collective bargaining, a private-sector union intent on enhancing the employer's market share might legitimately lobby for: protectionist legislation against foreign competition; the outlawing of domestic products that compete with or substitute for the employer's product; government price-fixing; government contracts for the employer under existing laws; new laws under which government contracts might be obtained; regulation of private conduct that requires the public to use the employer's product; government-guaranteed loans or other "bail outs" of the employer; nationalization of the employer's industry to guarantee permanent public subsidies; or even socialization of all private industry!!

Analogous lobbying by public-sector teachers' unions might include: outlawing or limiting the number of private schools, either directly or by imposing onerous "standards"; opposing tuition tax-credits or -deductions for private schools; opposing

Second, the contention proves too little, as it neglects the requirement that unions use "agency-fee" schemes "to charge nonmembers only for those activities that actually benefit them".[25] This Court has repeatedly said that "benefits" for nonunion employees are the *quid pro quo* for their payments of "agency fees" in both the private and the public sectors.[26] In the private sector, the crass materialism of the traditional union argument—"the more compensation the better"—crudely approximates reality.[27] But only *crudely*: for no significant economic gains through collective bargaining for employees of one employer fail to produce corresponding (albeit usually hidden) economic losses, primarily for employees, in other segments of society.[28] However, in the private sector, the positive and negative effects of collective bargaining are almost exclusively *economic* in character.

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government aid to private schools; or raising general taxes, on the theory that even a fixed percentage of an absolutely increasing governmental revenue equates with an absolutely increasing income for the public schools (and possibly an increase in compensation for public-school teachers).

[25] Communications Workers v. Beck, ___ U.S. ___, ___, 108 S. Ct. 2641, 2656 (1988).

[26] *E.g.*, Railway Employes' Dep't v. Hanson, 351 U.S. 225, 238 (1956); Machinists v. Street, 367 U.S. 740, 761 (opinion of the Court), 776 (opinion of Douglas, J.)(1961); NLRB v. General Motors Corp., 373 U.S. 734, 740-41 (1963); Abood, 431 U.S. at 221-22.

[27] Here, *amicus* assumes *arguendo* that increases in the income of the employer translate in part into increases in the compensation of its employees.

[28] *See, e.g.*, W.H. Hutt, *The Strike Threat System* (Arlington House, 1973); G.L. Velasco, *Labor Legislation from an Economic Point of View* (Liberty Fund Press, 1973).

And, presumably, if a legislature has constitutional authority to impose private-sector collective bargaining at all, it may also require employees to bear the hidden economic costs of the system as the price of the economic benefits it supposedly generates. In the *public* sector, contradistinguishably, the costs of collective bargaining are almost exclusively *political*.[29]

This Court has no scale for measuring *political* costs, and no formula for comparing *political* to *economic* costs (or benefits). Indeed, the very statement of the problem implies its insolubility. Were a simple constitutional answer at hand, the "spoils system"—in which public employees must suffer the political costs of supporting the party in power in order to obtain the economic benefits of public employment—would be legitimate, which it is not.[30] In the context of public-sector collective bargaining, the *erzatz* compromise of *Abood* conflates all costs and benefits as "economic", in loose analogy to the private-sector case.[31] This may caricature the truth within a local bargaining-unit, where the union limits its activities to interactions with *the employer alone* over matters of employee-compensation and other "bread-and-butter" *labor-management* issues. But the *Abood* com-

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[29] *E.g.*, if the union ultimately succeeds in obtaining increased compensation for non-union teachers through "lobbying . . . millage and ballot campaigns", but only at the cost of cuts in some other non-education-related program that those teachers favor (such as highway construction, environmental protection, funding of the arts, and so on), the teachers have been compelled to accept an economic benefit in exchange for a political detriment.

[30] *See* Rutan v. Republican Party of Illinois, ___ U.S. ___, 58 U.S.L.W. 4872 (1990).

[31] *See* 431 U.S. at 229-32.

promise collapses into unreality as soon as the union begins interacting with higher levels of government, and injecting its influence into "legislative and other 'political' arenas".

If *Abood* may be a workable compromise within the narrow ambit of "collective bargaining" as there defined (that is, *excluding* all "lobbying" not "an integral part of the bargaining process"), in this case the Court of Appeals' misreading of that decision transmogrifies *Abood* into a monster worthy of Dr. Frankenstein, with a body designed for purely economic activity along the lines of private-sector collective bargaining but with a brain infected by rabid political activism.[32] This Court never intended such a horrific result in *Abood*, and must not abide it now.

C. Should this Court sanction the Court of Appeals' notion that the costs of whatever FFA, MEA, and NEA choose to do "in legislative and other 'political' arenas" are includable in "agency fees" if those activities "sufficiently relat[e]" to collective bargaining,[33] it will impose on the federal courts a Sisyphean task. Hereafter, the aggressive activism of these "highly politicized organization[s]"[34] will generate one intractable case after another, requiring the courts to distinguish in the fashion of Solomon between activities "in legislative and other 'political' arenas" that "relat[e]" to collective bargaining *vel non*. *All* of these cases will be of *constitutional* dimension. *None* of them

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[32] The District Court candidly found that both MEA and NEA are "highly politicized organization[s]". Pet. App. at 32a, 39a, 643 F. Supp. at 1313, 1317.

[33] Pet. App. at 8a, 881 F.2d at 1392.

[34] Note 32, *ante*.

will present a *principled* basis for decision. And, because resolution of each case will turn on vague conceptions of "relatedness" to collective bargaining under *various* public-employment statutes, they will generate sets of *different* and *constantly changing* "constitutional" doctrines for each State, never-ending conflicts among the District and Circuit Courts, and a permanent stream of petitions for writs of certiorari to this Court.

This consequence reinforces the insight of Justice Powell in *Abood* that "no principled distinction exists" between a public-sector union and "a political candidate or committee",[35] confirms academic studies that public-sector unions (and, in particular, NEA and its affiliates) are a species of "political party",[36] and condemns this Court's reluctance to face the issue squarely heretofore and to rule that "agency-fee" schemes (whatever their merits in the private sector) are out of place in the inherently political context of public employment.[37]

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[35] 431 U.S. at 256-57 (separate opinion) (explaining the respects in which "the public sector union is indistinguishable from the traditional political party in this country").

[36] *See* Vieira, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293 (1978).

[37] *See* Knight v. Minnesota Community College Faculty Ass'n, 571 F. Supp. 1 (D. Minn. 1982)(three-judge court), *aff'd mem.*, 460 U.S. 1048 (1983). In *Knight*, this Court refused to review the constitutionality of "exclusive representation" by what the *Knight* plaintiffs claimed was an inherently political organization (the NEA and two of its Minnesota affiliates), even though the record was, according to the uncontradicted testimony of Professor Gordon Tullock, the distinguished political scientist, "more complete than I have ever seen before on any pressure group". Jurisdictional Statement in *Knight*, No. 82-901, at 10-11.

If, however, this Court feels compelled to re-affirm the compromise struck in *Abood*, to render that compromise workable it must rule that *no* union "lobbying" or other activism "in legislative or other 'political' arenas" is chargeable to non-union employees unless it is clearly "*integral* to the bargaining *process*". Unlike *substantive* "relatedness" to collective bargaining, "the bargaining *process*" is capable of clear-cut statutory and factual definition by reference to specific *procedural* interactions of unions, employers, and (in rare instances) those higher levels of government that may ratify or implement collective-bargaining agreements. Moreover, whether some union activity is "integral" to a *defined* bargaining process is itself definable to a degree of precision orders of magnitude superior to any attempt to "relate" (say) union "lobbying" to bargaining through a chain of conjectural causation similar to the one in the children's story that begins "For want of a nail the horseshoe was lost . . . ". Finally, by resting analysis in these cases on a *procedural* foundation, this Court can maximize the *general applicability* of the rule of decision across State jurisdictional lines, which is a prime desideratum of constitutional adjudication.

II. The Court of Appeals' decision authorizes a regime of *statewide* and *nationwide* "exclusive representatives" beyond what the Michigan legislature did, or constitutionally could do, in establishing "collective bargaining" for public employees in that State.

The Court of Appeals held that petitioners could be required to pay "agency fees" to MEA and NEA, even though: (i) the latter are *not* the actual "exclusive representative" for teachers at Ferris State College; and (ii) petitioners received no equivalent in

actual benefits for all the "fees" paid, much of the benefits accruing to persons in other bargaining-units in Michigan and other States.[38] By judicial *fiat*, this decision creates a regime of *statewide* and *nationwide* "exclusive representatives" that the Michigan legislature did not and could not constitutionally have established itself.

A. The Court of Appeals denied that, although MEA and NEA are not "the actual exclusive bargaining representative", "this distinction amounts to more than a technical difference in union organization" where MEA and NEA are "affiliated" to FFA.[39] The court did not explain why the vagaries of "*union* organization" should control—but the effect of its decision is to bootstrap MEA and NEA, through their self-defined "affiliation" with FFA, into the status of petitioners' "exclusive representatives" under Michigan law.[40]

What meant this remarkable term, "affiliation", to the courts below? Not that MEA, NEA, and FFA constitute a single organization; for the District Court found that MEA and NEA are legally *separate* corporations.[41] Not that the three are "integrated" (as organizational science understands that term) to the point of functioning as one organization; for the unions never themselves claimed, let alone proved, to be

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[38] Pet. App. at 6a, 10a-11a, 881 F.2d at 1391, 1393.

[39] Pet. App. at 6a, 881 F.2d at 1391.

[40] Mich. Comp. Laws § 423.211, sec. 11, *in* Pet. App. at 93a.

[41] Pet. App. at 19a-20a, 643 F. Supp. at 1308.

"integrated" in this sense.[42] Rather, "affiliated" imported only that: (i) MEA and NEA "provid[e] collective bargaining support services to [their] local affiliates"; (ii) their "budget[s] for those services may be financed from agency payer 'service charges' "; and (iii) the "agency shop fees" in a particular local need *not* "be calculated only with respect to services to [that local]", because "the *statewide* involvement of the MEA" and "the *nationwide* involvement of the NEA" in collective bargaining are "relevant to determining [their] agency shop fee[s]".[43] That is, "affiliated" simply embodied the lower courts' *fiat* that licensed MEA and NEA to charge non-union teachers at Ferris State College for "services" *those teachers never receive* because the "services" are delivered on a "statewide" or "nationwide" basis to *other* employees!!

Thus, self-evidently, "affiliated" is mere adjectival double-talk designed to camouflage forced subsidization of MEA and NEA *as institutions*, regardless of "services" they provide—*or do not provide*—to non-union employees such as petitioners. Such a disinformational label cannot control decision of the First-

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[42] In *Knight*, after extensive hearings, the three-judge District Court found that NEA and its State and local affiliates are not "integrated". *See* 571 F. Supp. at 6-7. NEA should be collaterally estopped to claim the opposite here. *See, e.g.,* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); *Restatement (Second) of Judgments* (1980), §§ 27-29.

[43] *In re* Bridgeport Spaulding Community Schools, Nos. C79-J-353 & CU79-J-51 (A.L.J., 24 Feb. 1986), Slip Op. at 34 (emphasis supplied), adopted as ruling Michigan case-law by the District Court, Pet. App. at 58a, 643 F. Supp. at 1326, and by the Court of Appeals, Pet. App. at 6a, 881 F.2d at 1391.

Amendment issues here.[44] Moreover, contrary to the Court of Appeals, *Ellis* endorsed *no* "agency-fee" payments to "affiliates" *un*related to *actual* services the "affiliates" provided.[45]

B. The District Court's rationalization for allowing "agency-fee" payments to MEA and NEA where the latter render *no* collective-bargaining services to petitioners is more elaborate than the Court of Appeals', but quite as fallacious.

1. "[S]ince unions operate on a cost-sharing basis," argued the District Court, "extraordinary expenses incurred by one unit in any given year are spread out over all units represented by the union".[46] How

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[44] *See, e.g.,* City of Madison, Joint School Dist. No. 8 v. WERC, 429 U.S. 167, 173-74 & n.5 (1976); Riley v. National Fed'n of the Blind, ___ U.S. ___, ___, 108 S. Ct. 2667, 2677 (1988).

[45] The Court of Appeals argued that *Ellis* allowed charging non-union employees "for the costs of the union's national convention, even though employees in other bargaining units participated in and benefited from such conventions". Pet. App. at 10a, 881 F.2d at 1391. The point, however, is that the petitioners in *Ellis themselves* benefited from the convention, because it was "an integral part of the bargaining process" under *Abood*.

The Court of Appeals also pretended that *Ellis* allowed the union to charge for publications reporting on "chargeable activities * * * *unrelated* to the specific bargaining unit of the dissenting employees". Pet. App. at 10a, 881 F.2d at 1393. This is untrue. *Ellis* held only that a union "may charge objecting employees for reporting to them about those activities it can charge them for doing". 466 U.S. at 451. Later in the opinion, this Court held that "[t]he expenses of litigation not having a connection with the bargaining unit are not to be charged to objecting employees". *Id.* at 453. Taken together, these holdings clearly refute the Court of Appeals' contrary notion.

[46] Pet. App. at 56a, 643 F. Supp. at 1325.

unions choose to "operate", however, is not controlling. The *Constitution* requires that "agency fees" have a rationally demonstrable connexion to benefits *the payers of those fees in fact receive*. "Agency-fee" schemes are permissible to "spread out" expenses among employees within the selfsame unit receiving the services generating those expenses—not to divorce services from payments among different units simply because some have "extraordinary expenses" relative to others. Otherwise, *all* the units involved in "cost-sharing" would constitute *one* unit for purposes of the "agency fee".[47]

2. "[C]ooperative cross-funding", the District Court offered, "enables the union to effectively represent * * * units in hard cases that will have an impact on the greater whole".[48] Surely, the ability to rifle the treasuries of other locals enables MEA and NEA to assist some "units in hard cases"—but what, besides airy conjecture, justifies the conclusion that this "*will* have an impact on the greater whole", including the pilfered locals, later on or even ever? And what is "the greater whole", but an *assumed* state-wide or nationwide MEA or NEA unit?

MEA and NEA whitewash this "cross-funding" scheme as a species of "insurance"-payments for contingent services that are "*equally* available to all"

[47] This "cost-sharing" theory shows most clearly how the Court of Appeals' ruling fuses all local units represented by an NEA-"affiliate" in Michigan into *one* grand State unit, and that state unit into *one* grand national unit embodying all the other State and local units with NEA-"affiliated" representation.

[48] Pet. App. at 56a, 643 F. Supp. at 1325.

local units statewide and nationwide.[49] This is childish fantasy.[50] True "insurance" is an *enforceable* contractual *right* in the insured to receive a definite, stipulated benefit upon the occurrence of some defined event. Conversely, the fictional "insurance" of the MEA-NEA "cross-funding" scheme is a *non*enforceable *absence of right* to receive, at an *un*certain time and in *un*defined circumstances, some *un*certain "service" from MEA or NEA—neither of which is the certified "exclusive representative" of the local bargaining-unit, and therefore neither of which is subject to the judicially enforceable "duty of fair representation".[51]

3. The District Court then complained that "a unit-by-unit breakdown of * * * [union] expenditure[s] * * * would *logically* lead to drastic fluctuations in the amount of the service fee".[52] So what? Why should

[49] *E.g.*, Respondents' Brief in Opposition in No. 89-1217, at 12.

[50] Perhaps *hubris* is a more descriptive term. For what private groups in American society other than militant public-sector unions such as MEA and NEA would dare to contend that they have a right: (i) to dictate to individuals what "services" those individuals "may" need in the future; (ii) to charge "fees", the amounts of which the groups themselves unilaterally determine, for the claimed "availability" of the "services", regardless of whether those "services" are ever actually delivered, or are even capable of being delivered, to the payers; and then (iii) to resist all attempts by the payers to limit the "fees" to group activities that actually benefit them?

[51] This is crucially significant, because only the enforceability of the "duty of fair representation" arguably saves "exclusive representatation" from unconstitutionality. *See* Steele v. Louisville & N.R.R., 323 U.S. 192, 198-99, 203, 207 (1944).

[52] Pet. App. at 56a, 643 F. Supp. at 1325.

not each local unit have to live within its own budget, and itself pay for whatever level of collective-bargaining services it desires? On what theory—other than that "agency-fee" schemes may redistribute employees' income among local units throughout both Michigan and the United States—can the District Court's desideratum of "stable dues" override the constitutional command that the "fees" paid must be proportionate to the benefits received?

4. Finally, the District Court argued that "imposing a constitutional requirement of a unit-by-unit breakdown of * * * expenses would create an unreasonable and unmanageable administrative burden on" MEA and NEA.[53] "[A]dministrative convenience alone", however, "is insufficient to make valid what otherwise is a violation of [constitutional] law".[54]

C. Both the Court of Appeals and the District Court assumed that Michigan law does, and constitutionally may, allow a statewide and nationwide pooling of "agency fees". This assumption lacks even argumentative support.

1. Michigan law states that "[r]epresentatives * * * selected for purposes of collective bargaining in *a unit* appropriate for such purposes, shall be the exclusive representatives of all the public employees in *such unit*".[55] Nothing in the statute suggests that the

[53] Pet. App. at 57a, 643 F. Supp. at 1325.

[54] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974). *See* Ellis, 466 U.S. at 444. *See also* Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 306-07 (1986) (First Amendment and fundamental fairness require that burden of proof as to amount of "agency fee" must be borne by the union).

[55] Mich. Comp. Laws § 423.211, sec. 11, *in* Pet. App. at 93a (emphasis supplied).

"unit" automatically becomes *statewide* or *nationwide* as to any of the powers of the "exclusive representative" simply because the latter has state or national "affiliates".

2. The Michigan legislature lacks constitutional power to require public employees in Michigan to finance collective bargaining by public employees in other States, or to require public employees in other States to subsidize collective bargaining by public employees in Michigan. Yet those powers would have to exist for the "cost-sharing" scheme of "agency fees" upheld by the lower courts to be lawful.

3. Even within Michigan, "agency fees" must reflect a *quid pro quo* for benefits non-union employees actually receive through collective bargaining. A statewide "cost-sharing" system among all Michigan locals represented by an MEA "affiliate" divorces—*and is intended to divorce*—"fees" from benefits, and is therefore unconstitutional on its face. *A fortiori* a nationwide scheme embracing all NEA-"affiliated" locals throughout the United States!

In sum, the theory of the lower courts might be arguable if the purpose of collective bargaining in Michigan were—or constitutionally could be—to force nonunion public employees to guarantee the existences and finance the activities of MEA and NEA *as institutions*, regardless of the lack of benefits the individual employees receive from their "agency-fee" payments. This is not the purpose of bargaining under Michigan law, and may not constitutionally be its purpose under *Abood* and *Ellis*.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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